STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Cum-20-181

AVANGRID NETWORKS, INC.,

Plaintiff-Appellant,

v.

MATTHEW DUNLAP, in his official capacity as Secretary of State for the State of Maine,

Defendant-Appellee,

v.

MAINERS FOR LOCAL POWER, *et al*.,

Intervenors.

ON APPEAL FROM
THE CUMBERLAND COUNTY SUPERIOR COURT

REPLY BRIEF OF INTERVENORS MAINERS FOR LOCAL POWER AND NINE MAINE VOTERS

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INTRODUCTION

The Superior Court correctly decided this case: Avangrid's constitutional challenges, regardless of their merit, must follow the election. Citizens, including the Voter Intervenors, have a constitutional right to vote on a validated ballot initiative. What is more, courts do not—indeed, should not—adjudicate the substantive constitutionality of *proposed* legislation prior to its enactment. Courts strenuously avoid intervening in the political process, regardless of whether it is people or the Legislature voting on the legislative proposal.

Avangrid offers essentially one response—its repeated contention that the Initiative is not actually a "resolve" because it is not generally applicable (or is otherwise unlawful). That argument lacks merit. On its face, the Initiative is a "resolve," a form of law that applies to specific circumstances. The Court has already observed that "[t]he initiative proposed the adoption of a legislative resolve," *Reed v. Sec'y of State*, 2020 ME 57, ¶ 2, ___ A.3d ___. And the features of the Initiative on which Avangrid focuses (that it is not "generally applicable" and that it directs PUC action "in a single docket") are shared by the Aqua Ventus Resolve, which the Legislature enacted just last year. In all, the Initiative is undeniably a *resolve*.

Avangrid's claim is really that the Initiative is an *unconstitutional* resolve. That is not an argument invoking a subject matter limitation governing the scope of the *ballot initiative* right. Rather, it is an argument about the scope of the legislative authority as a whole—the argument would be the same if the Legislature itself

adopted this law. These claims must therefore follow the election.

In any event, the Initiative is constitutional. The people's power is coextensive with the Legislature's. And the Legislature may override decisions of the PUC via special legislation—the Court has identified this authority, it was baked into the PUC's enabling statute, and the Legislature exercised this power just last year.

The various counterarguments take three main forms. First, Avangrid claims that the Initiative is unlawful because it is specific to the CMP Corridor, rather than a law of general applicability. This argument is simply an attack on the constitutionality of special legislation. But the Maine Constitution authorizes special legislation, the Court has long so held, and the Legislature has long so acted.

Second, Avangrid asserts that the Legislature lacks authority to overturn decisions rendered by the PUC. That argument also fails. As the Court held in *Auburn Water*, although the Legislature delegated its legislative authority to the PUC, it may withdraw that delegation and direct the PUC via specific legislation. Avangrid's argument would gut the scope of legislative authority, tying the hands of the Legislature and rendering statutes and recent resolves unconstitutional.

Third, Avangrid claims that the Court's *NextEra* judgment changed the calculus. That contention is incorrect for three independent reasons: The underlying regulatory scheme—addressing the regulation of *public* utilities for the *public* benefit—is structurally non-final; the *Lewis* and *Plaut* doctrine does not attach to the sort of public right at issue here; and the Initiative does not invalidate *NextEra*.

ARGUMENT

I. The Superior Court Correctly Held That This Lawsuit Is Premature.

A. Because it was validated, the Maine Constitution guarantees citizens the right to vote on the Initiative.

The Maine Constitution secures to voters the right to propose, consider, and—if validated—*vote* on an initiative. (MLP Br. 8-11.) No one disputes that the Initiative was duly validated. *Reed*, 2020 ME 57, ¶ 1, ___ A.3d ___.

Nor is there any dispute that the judiciary retains the power to review the constitutionality of a ballot initiative. The question is *when*. The Maine Constitution supplies the answer: When an initiative is validated, the people have a right to vote; if the Initiative is enacted, challenges to its constitutionality may follow.

The Constitution erected this structure for an especially good reason—"the encouragement of participatory democracy." *Wagner v. Sec'y of State*, 663 A.2d 564, 566 (Me. 1995). In Avangrid's alternative view, courts would function as the gatekeeper to proposed legislation, vetting the constitutionality of proposals in the middle of the political process, prior to any vote. But that is not how our democracy, in the main, works.[1] After citizens labor to achieve a validated ballot initiative, the Constitution guarantees them the right to vote on it. "[T]here are clear benefits to allowing the public to vote on an initiative, even though its validity may be questioned if it passes. In a democracy, the process itself is often as valuable as the

[1] To be sure, the Maine Constitution *does* provide a mechanism for pre-enactment review of the constitutionality of legislation—"upon solemn occasions, when required by the Governor, Senate or House of Representatives." Me. Const. art. VI, § 3. That process was not used here.

result." *Winkle v. City of Tucson*, 949 P.2d 502, 507 (Ariz. 1997) (en banc).[2]

Wagner identified the mandatory nature of Section 18. 663 A.2d at 566 n.3. Later opinions by Justices of this Court understood *Wagner* accordingly. (MLP Br. 9-10.) *Wagner* thus viewed the case via the lens of the "declaratory judgment statute," 663 A.2d at 567, and did not suggest that an injunction could be proper.

Because it was validated, the Initiative must go on the ballot.[3]

B. Avangrid's claims are not "subject matter" challenges—and its attempt to dispute whether the Initiative is a "resolve" fails.

Not only does the Constitution bar Avangrid's claims, so too does the ripeness doctrine. *Wagner* settled the governing framework: To the extent any pre-election challenges are cognizable, it is those that go to the "subject matter" of the "electorate's grant of authority." 663 A.2d at 567. This includes consideration of whether, "[o]n its face," an initiative is a "bill, resolve, or resolution." *Id*. But there is no pre-election review of a claim "that the proposed action is substantively unconstitutional." *Id*. at 568 n.5. That is, courts do not address the "constitutionality

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[2] If a court invalidates an initiative that the citizens enacted, the Legislature remains free to accomplish the people's objectives through alternative means, as the Legislature did with ranked-choice voting.

[3] Additionally, Section 18 and 22 work in harmony—any cognizable pre-election challenge is one that goes to the validity of the Initiative. (MLP Br. 18-20.) Section 22 creates an orderly process for the resolution of such claims; as a result, regardless whether cognizable pre-election, Avangrid's claims are not timely now. Rather, because it seeks pre-election review, Avangrid should have raised its claims during the validation challenges. The plaintiffs in *Wagner* did just that, filing their challenges as part of their request for "review of final agency action." 663 A.2d at 566. (In *Wagner*, no one invoked a Section 22 argument, and the Court thus did not consider whether Section 22 barred the claim.)

Avangrid asserts (at 3 n.2) that its claims "were not ripe until this Court affirmed the Secretary's" validation of the Initiative. To be clear, we do not believe that its claims are ripe *at all* pre-election. But Avangrid's argument makes little sense. If the "vote" is the "controversy," *id.*, that controversy ripened when the Secretary issued a "decision" "that validated" the Initiative. *Reed*, 2020 ME 57, ¶ 1, __ A.3d ___. It is *that* action that Avangrid putatively challenges, which explains why it sued the Secretary. In fact, this case and *Reed* address the *identical* action—the Secretary's validation decision.

of the initiative if enacted." *Id*. Avangrid's claims are, as the Superior Court held, "substantive challenges" and thus not ripe now. (A. 21.)[4]

Avangrid attempts to shoehorn its claims into a subject matter challenge by asserting that the Initiative, despite its text, is not actually "a 'bill, resolve, or resolution.'" (Avangrid Br. 7.) But the *reasons* Avangrid supplies for that conclusion go to the substantive constitutionality of the Initiative. By attempting to merge substantive challenges to an Initiative's constitutionality with the narrow scope of "subject matter" limitations unique to the ballot process, Avangrid would obliterate the ripeness doctrine that the Court adopted in *Wagner* and reaffirmed in *Lockman*.

1. "On its face," *Wagner*, 663 A.2d at 567, the Initiative is a "resolve." (A. 16.) A legislative "resolve" is an appropriate exercise of the "legislative power." Me. Const. art. IV, pt. 1, § 1. "Resolves have the same force of law as acts;" the distinction is that resolves "are restricted in application, much the same as private and special law bills." Maine Legislative Drafting Manual 42 (rev. Oct. 2016). Thus, "[r]esolves are the proper instrument for one-time occurrences." *Id*.[5]

The Court has already observed that "[t]he initiative proposed the adoption of a legislative resolve." *Reed*, 2020 ME 57, ¶ 2, ___ A.3d ___. The Superior Court

[4] Gordon & Magleby, on whom Avangrid relies (at 8-9), make this precise distinction. A "subject matter limitation" is quite distinct from "a general substantive prohibition." James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 Notre Dame L. Rev. 298, 316 (1989). Virtually all courts take this same approach.

[5] Resolves are ubiquitous: The 128th Legislature adopted 61 resolves; the current Legislature has adopted 138. And "[a] resolve never contains an enacting clause." Maine Legislative Drafting Manual 42. That is why none of the 138 resolves passed by the Legislature this session contain an enacting clause.

agreed: "The initiative proposed the adoption of a legislative resolve." (A. 16.)

What is more, the Legislature recently enacted the Aqua Ventus Resolve, which made a specific finding as to whether a public utilities project was in "the public interest," and directed the PUC to approve a specific contract in a specific docket. Resolves 2019, ch. 87. (MLP Br. Add.) The Initiative is substantively identical to this resolve that the Legislature recently adopted. This is especially compelling evidence that, "[o]n its face," *Wagner*, 663 A.2d at 567, it is a "*resolve*."

2. Avangrid's real argument is that, for a grab-bag of reasons, the Initiative is an *unconstitutional* resolve. Avangrid acknowledges, as it must, the governing rule: "a pre-election challenge to the substantive validity of an initiative if adopted is not ripe." (Avangrid Br. 8.) That describes Avangrid's claims. *See* (A. 21.)

If, as Avangrid would have it, an *unconstitutional* resolve ceases being a "resolve" for purposes of Section 18, then the governing rule disappears, swallowed by the exception. In Avangrid's telling, "pre-election review is not limited to express constitutional prohibitions unique to the initiative process." (Avangrid Br. 11.) What then *does* cabin the scope of pre-election review? Avangrid answers that, if an initiative "exceeds the legislative power," it is outside the authority of "§ 18." (Avangrid Br. 18.) But legislation that is unconstitutional for *any* reason "exceeds the legislative power." That is an essential purpose of a constitution.[6]

[6] Because the Legislature exercises "plenary power," it "'may enact any law of any character or on any subject unless it is prohibited, either in express terms or by necessary implication, by the Constitution of the United States or the Constitution of this State.'" *League of Women Voters v. Sec'y of State*, 683 A.2d

Wagner rejected an argument no different than Avangrid's. There, the plaintiffs argued to the Court that the initiative "leaps over the line of permissible legislative action," because it (allegedly) limited "future state Legislatures." Br. of Appellants at 16, 24, *Wagner*, 663 A.2d at 566. Despite this argument turning on the scope of legislative authority, the Court declined to resolve the "constitutionality of the initiative if enacted." *Wagner*, 663 A.2d at 567. In *Lockman v. Sec'y of State*, 684 A.2d 415 (Me. 1996), the Court reaffirmed *Wagner*.[7]

Avangrid's theory is thus irreconcilable with both *Wagner* and *Lockman*. Try as it might, Avangrid cannot make its claims something they are not. They assert the kind of "general substantive prohibition[]" that would be argued against laws enacted by the Legislature; they are not restrictions on the "procedure" or "subject matter" unique to initiatives. Gordon & Magleby, *supra* note 4, at 316.[8]

3. In fact, Avangrid's argument is a recipe for pre-enactment review of a forthcoming vote by the *Legislature*. Again, Avangrid's argument reduces to its contention that the Initiative is "not *legislative*" and therefore not a "resolve." (Avangrid Br. 12 & n.6.) Like the people, the Legislature exercises the "*legislative*

769, 771 (Me. 1996). Thus, the scope of "legislative power" is delineated negatively by express constitutional restrictions; that is, the Legislature can pass *any* law, unless it violates a constitutional provision.

[7] In *Lockman*, the plaintiff contended that, because a competing measure allegedly violated the Constitution's super-majority requirement for laws that alter the use of state land, the competing measure exceeded the scope of legislative authority and the claim was accordingly cognizable pre-election. 684 A.2d at 420. Applying *Wagner*, the Court disagreed, holding that the claim was unripe because the measure "may not be approved." *Id.*

[8] At the oral argument below, Avangrid attempted to argue that any facial constitutional challenge to a ballot initiative (as opposed to an as-applied challenge) was cognizable pre-election. It appears that Avangrid has now abandoned that argument. That is for good reason, as it would enable limitless challenges to ballot initiatives, in clear contravention of *Wagner*.

power." Me. Const. art. IV, pt. 1, § 1 (emphasis added). If, as Avangrid maintains, a pre-vote challenge may lie regarding whether the Initiative is sufficiently "legislative," Avangrid could press the same claim to enjoin a vote by the Legislature. In view of the Aqua Ventus Resolve enacted last year, this concern is far from hypothetical. Under Avangrid's theory, a party dissatisfied with that proposal could have sued *before* the vote, claiming that the Legislature was not properly exercising the "legislative power." But doing so "would involve [the Court] at least indirectly in the legislative process, in violation of the separation of powers mandated" by the Maine Constitution. *Wagner*, 663 A.2d at 567 (quotation marks omitted).

4. As we showed (MLP Br. 16-18), if the Court looks to out-of-state authority, it confirms this result.[9] Not only does *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989 (Alaska 2004), adopt precisely the rule we advance,[10] (Sec'y Br. 13 n.5.), so too does the heartland of authority. (MLP Br. 17-18.)[11]

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[9] Avangrid's outsized reliance (at, *e.g.*, 7-8, 9, 13) on *Philadelphia II v. Gregoire*, 911 P.2d 389, 393 (Wash. 1996), is misplaced. As the Washington Supreme Court later held in *Coppernoll v. Reed*, 119 P.3d 318 (Wash. 2005) (en banc), the initiative in *Philadelphia II* failed because it was an effort "to enact *federal* law." *Id*. at 323-24. Notwithstanding *Philadelphia II*, *Coppernoll* held clearly that arguments that an initiative is "unconstitutional and accordingly exceed the legislative power as a matter of law" are not cognizable pre-election. *Id*. at 324. That is *exactly* what Avangrid argues here (at 18)—that the "Initiative Exceeds the Scope of the Legislative Power." In declining to address multiple substantive constitutional challenges, including that the initiative "violate[d] separation of powers principles," *id*., *Coppernoll* refused to "open the floodgates to preelection challenges of nearly any proposed initiative," *id*. at 325.

[10] *Alaska Action Center's* recognition of "subject-matter limitations on initiatives" strongly supports our position. *Alaska Action Center's* explained that these are limits unique to the *initiative* authority, including the provision stating that a ballot initiative may not be used to create a new court. (MLP Br. 17 n.7.)

[11] The cases in Avangrid's footnote do not support pre-election review. *First*, as the Superior Court held (A. 18 n.5), Maine law, especially the Constitution, resolves this case. Other states have materially different laws; as we explain below, for example, special laws are prohibited in Utah. *Second*, these cases largely restate the principle found in Gordon & Magleby; the issue here is not the principle, but rather Avangrid's misapplication of it. *Third*, many of these cases address *municipal* initiatives, where the dis-

II. The Initiative Is Constitutional.

A. The Constitution authorizes special laws.

Avangrid's leading argument—that "[t]he Initiative is not a proper exercise of legislative power because it is neither generally applicable nor capable of future application" (Avangrid Br. 20)—appears to challenge the very existence of special legislation. But the Constitution provides that special legislation is within the scope of the legislative power, and the Court has repeatedly acknowledged that special laws are permissible. (MLP Br. 37.) Avangrid itself later agrees that "the Constitution permits special legislation." (Avangrid Br. 36.)

Special legislation is textually hard-wired into Section 18, which authorizes the people to adopt not just a "bill," but also a "resolve." Me. Const. art. IV, pt. 3, § 18, cl. 1. Because "[r]esolves do not affect the general law and are restricted in application," just like "special law bills," Maine Legislative Drafting Manual 42, the Constitution has explicitly conferred on Maine voters the right to enact measures that lack general applicability. Avangrid's argument, therefore, is a thinly-veiled request to delete the term "resolve" from Section 18 of the Constitution.

The U.S. Supreme Court recently rejected the contention "that legislation must be generally applicable, that 'there is something wrong with particularized

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tinction between whether an initiative is "legislative" or "administrative" may be relevant because of a specific limitation on the scope of the initiative power in that context. That was so in *Friends of Congressional Square Park v. City of Portland*, 2014 ME 63, 91 A.3d 601, 604. *See* (MLP Br. 22.) As the Superior Court concluded, the "'legislative/administrative' distinction has frequently been applied in other jurisdictions considering municipal or county initiatives." (A. 21.) That has no bearing on "the question of whether a citizens initiative under the Maine Constitution that has obtained the necessary signatures is entitled to be placed on the ballot." (A. 21.)

legislative action.'" *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2016). Since the power of the Maine legislature is *broader* than that of Congress, *League of Women Voters*, 683 A.2d at 771, it follows that the Legislature has the power to enact special laws.[12] And the Legislature often does so,[13] including the Aqua Ventus Resolve, directing specific PUC action.[14]

For these reasons, the focus of various parties on the distinction between "legislative" and "administrative" actions is misplaced. As we described (MLP Br. 21-23), "[t]he exercise of initiative power by the people is simply a popular means of exercising the *plenary* legislative power." *League of Women Voters*, 683 A.2d at 771. The question, therefore, is whether the *Legislature* can adopt the Initiative at issue. (MLP Br. 21-23.) As the Superior Court correctly concluded, legislation has "never been invalidated on the ground that the action taken by the legislature was 'administrative' rather than 'legislative.'" (A. 22.)

The cases distinguishing between "legislative" and "administrative" actions addressed issues different than those here. *Friends of Congressional Square Park*, 2014 ME 63, 91 A.3d 601, 604, considered whether—as a *statutory* matter—a mu-

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[12] *Nadeau v. State*, 395 A. 2d 107, 112 (Me. 1978), considered *Lewis v. Webb*, 3 Me. 326 (1825), yet held special laws permissible. Indeed, the Constitution authorizes them. Avangrid's position would yield the surprising result that the hundreds of special laws enacted by the Legislature are unconstitutional.

[13] We cited some examples earlier, (MLP Br. 37 n.22), and there are many more. *See, e.g.*, P & S.L. 2013, ch. 7 (validating certain real estate transactions made by a company notwithstanding its suspended charter); P & S.L. 2011, ch. 10 (authorizing the construction of two specific crematoriums).

[14] Ballot initiatives have previously addressed issues that lack "general applicability." To block a ski resort, one successful initiative directed "[t]he Department of Conservation … to acquire … land on and around Bigelow Mountain … for a public preserve." L.D. 1619, I.B. 1 (1976). It thus directed the executive to take specific action, about specific land, in response to a construction project the public opposed. Ballot initiatives have also been used to approve (or reject) specific proposed casinos. (MLP Br. 23 n.11.)

nicipal ordinance addressed a "legislative matter[] on municipal affairs." It did not address constitutional limitations on the power of the *Legislature* to act.[15]

Avangrid's objection (at 36) that the Initiative is too specific also fails. The Legislature may provide direction in a specific case through a special law. (MLP Br. 39.) That sort of law refines what otherwise is a more general standard. That was the basis of *Auburn Water*, and it was the practice described and approved at length in *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1162 (10th Cir. 2004).[16]

B. The Legislature may overturn actions by its agent, the PUC.

To assess whether the Legislature may overturn PUC actions, the proper question is key. The issue is not whether the Legislature possesses this power. Rather, because legislative authority is plenary, the question is whether anything in the state or federal *constitution* (and nowhere else) *bars* the Legislature from doing so. *League of Women Voters*, 683 A.2d at 771; (MLP Br. 23). There is no bar.

Moreover, because the PUC exercises delegated legislative authority—the

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[15] *Carter v. Lehi City*, 269 P.3d 141, 147 (Utah 2012), on which Avangrid places chief reliance (at 21-22), is inapposite. *First*, the Utah Constitution bars special laws. 269 P.3d at 153 (citing Utah Const. art. VI, § 26). *See also Colman v. Utah State Land Bd.*, 795 P.2d 622, 636 (Utah 1990). Not so in Maine. *Carter* certainly did not address the meaning of a "resolve" in Maine, which is a central feature of Section 18. *Second*, *Carter* addressed a different problem than that here—how to determine whether certain proposed action by a *municipality*, which "often wield[s] both legislative and executive power," may be achieved by a ballot initiative. 269 P.3d at 162. *Carter* acknowledged that, at the state level, the "initiative power [of the people] is parallel to the state legislature's power." *Id.*

Vagneur v. City of Aspen, 295 P.3d 493, 504 (Colo. 2013), is cut from the same cloth. It distinguished between legislative and administrative functions "at the municipal level because the governing body of a municipality often wields both legislative and executive powers and frequently acts in an administrative as well as a legislative capacity." *Id*. Relevant here is whether the *Legislature* has the power to act.

[16] The equal protection clause addresses a claim that "politically disfavored groups" are improperly singled out, not Section 13. *Cf.* (Avangrid Br. 36 n.24.) The special legislation clause "is not . . . another equal protection clause." *Fitzpatrick v. Greater Portland Pub. Dev. Comm'n*, 495 A.2d 791, 794 (Me. 1985). Avangrid asserts no equal protection claim here.

PUC acts as the "agent" of the Legislature—the Court has held that the Legislature may overturn PUC actions. *Auburn Water Dist. v. Pub. Utils. Comm'n*, 163 A.2d 743, 744 (Me. 1960). That is, the Legislature never "surrendered" its power. *Id*. *See* (MLP Br. 23-27.) Avangrid tries (at 25-26) to narrow *Auburn Water* to oblivion, claiming that it applies only to a charter adopted by the Legislature prior to a PUC order. But the specific legislative charter at issue was not a law of general applicability, governing all similar rates—it applied to a single water district. In all events, Avangrid does not attempt to address the reasoning in *Auburn Water*, which identified how, given the principal-agent relationship, the Legislature may control the PUC through legislation directing specific action. (MLP Br. 23-25.)

Avangrid responds principally with *In re Searsport Water Co.*, 118 Me. 382, 108 A. 452 (1919), a decision that predated *Auburn Water* by decades. In *Auburn Water*, the Court considered *Searsport* expressly; *Searsport* acknowledged, the Court held, that "the Legislature had the power to exempt" certain matters from the "general regulatory power" through legislation. 163 A.2d at 226-27. That is precisely the authority that the Initiative exercises.

When it created the PUC, the Legislature reserved to itself express authority to overturn PUC orders. 35-A M.R.S. § 1323. Ever since the PUC's inception, the Legislature may enact measures regarding specific "right[s], privilege[s] or immunit[ies]" available from the PUC. *Id*. *See* (MLP Br. 25.) Avangrid fails to reconcile any of its arguments with Section 1323's direct statement that the Legislature

has the power to overturn specific PUC actions relating to specific parties.[17]

The Aqua Ventus Resolve, Resolves 2019, ch. 87, is especially powerful evidence that the Legislature may direct the PUC to take particular actions as to specific parties in specific dockets.[18] The Legislature has this power, and it employs it.

C. The Initiative does not infringe judicial authority.

Avangrid's argument stemming from *Lewis* and *Plaut* fails for three reasons.

First, the PUC determination at issue is structurally non-final, and thus the *Lewis*/*Plaut* doctrine does not apply. (MLP Br. 30-32.) While most adjudications are final, the PUC has unusual ability to reconsider prior orders so as to protect the *public* interest. Even if, as Avangrid contends (at 31), a "change of circumstances" is necessary to reopen a PUC decision, that would place this structure on the same footing as the worker's compensation benefits addressed in *Morrissette v. Kimberly-Clark Corp.*, 2003 ME 138, 837 A.2d 123, which did not trigger *Lewis*.[19] But Avangrid misreads *Verizon N.E., Inc. v. Pub. Utils. Comm'n*, 2005 ME 16, ¶ 11, 866 A.2d 844: It says, plainly, that the PUC (unlike a party) may reopen a case even absent a change in circumstances. 2005 ME 16, ¶¶ 8, 10, 866 A.2d 844. The PUC understands *Verizon* this way. (MLP Br. 31 & n.17.) And the governing stat-

[17] To be clear once more, our argument is not that the Initiative invokes Section 1323. It is that Section 1323 is proof positive of the Legislature's authority to overturn the PUC. Because the Initiative, if enacted, would itself be legislation, it need not fit within any existing legislative structure.

[18] The PUC's decision to reopen the docket (Avangrid Br. 26 n.18) is the conduct that motivated the Legislature to act—and it was the decision that the Legislature *overruled*. Resolves 2019, ch. 87. In all events, the point is that the Legislature ordered the PUC to take specific action in a specific docket, notwithstanding the PUC's prior findings. What is proposed here has been done before.

[19] If the citizens of Maine decide, by public vote, that the CMP Corridor is *not* in the public interest, that itself is a "change in circumstances" that would bear on the CPCN determination.

ute, 35-A M.R.S. § 1321, authorizes the PUC to alter its prior orders.

Second, *Lewis* and *Plaut* do not apply because the CPCN involves a public, rather than a private, right. (MLP Br. 32-33.) This point alone is decisive.

Third, the Initiative does not "invalidate" the *NextEra* judgment. As Avangrid recognizes, *NextEra* held that the PUC grant of a CPCN was a "reasonable" exercise of its discretion. (Avangrid Br. 32.) Directing the PUC to exercise its discretion *differently* does not conflict with the Court's judgment that the original PUC decision was one of potentially several reasonable options. (MLP Br. 34-37.)

III. Neither Injunctive Nor Declaratory Relief Is Warranted.

Avangrid cannot prevail: The citizens' right to vote on an Initiative bars an injunction, Avangrid's claims are not ripe, Section 22 renders this case untimely, and Avangrid's claims fail on the merits. Setting all that aside, additional factors counsel strongly against an injunction or declaratory relief.

1. Avangrid has no plausible claim that an election would cause it irreparable harm. Avangrid invokes (at 38) the principle that "a prospective violation of a constitutional right constitutes irreparable injury." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). But *Gordon* addressed an *enacted* law, not a legislative proposal. There is no authority for the proposition that a forthcoming legislative *vote* (by either the people or the Legislature) is irreparable harm. That would be a recipe—if not invitation—to enjoin votes by the Legislature. Additionally, unlike *Gordon*, Avangrid does not assert a prospective violation of *its* constitutional

rights. The vote itself does would not cause Avangrid any harm. Rather, it claims that proposed legislation, if enacted, would cause economic loss. But that loss is not imminent, and Avangrid may sue if the Initiative carries, prior to any loss.[20]

The Maine Chamber surfaces what is actually at stake—the funds that plaintiffs will voluntarily spend in an attempt to influence voters. It calls the "costs of contesting the election" "necessary expenditures." (Chamber Br. 3, 38.) A party may not invent irreparable injury by engaging in voluntary lobbying efforts.

2. Because an injunction would inflict severe and permanent harm on Maine voters, including the Voter Intervenors, it is not in the public interest.[21]

"[P]articipatory democracy," *Wagner*, 663 A.2d at 566, is not mere "[r]hetoric." (Chamber Br. 14.) It is the "absolute" right of the people to propose—and then enact—laws of their choosing. *McGee v. Sec'y of State*, 2006 ME 50, ¶ 21, 896 A.2d 933. The "'significance'" of this "powerful tool" "'must not be overlooked.'" *Id*. ¶ 24. The Constitution established this as a right precisely so that some cost-benefit analysis is not used to disenfranchise voters. Regardless of the Initiative's constitutionality, the people have a right to speak by the most powerful means available in a democracy—through the ballot box.

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[20] If the Initiative passes, there is built-in delay before it becomes effective, providing Avangrid ample opportunity to bring any judicial challenge it deems appropriate. (Secretary Br. 26 & n.13; MLP Br. 12.)

[21] The Court should decline the Secretary's invitation to issue a declaratory judgment. *First*, whether to do so is in the discretion of the trial court. 14 M.R.S. § 5958. The trial court's declination to issue a declaratory judgment was not "an abuse of discretion." *LeGrand v. York Cty. Judge of Prob.*, 2017 ME 167, ¶ 31, 168 A.3d 783. *Second*, there is no "genuine controversy" here, which requires "a concrete, certain, or immediate legal problem." *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶¶ 20-21, 221 A.3d 554 (citations and quotation marks omitted). Because "the initiative may never become effective," the Court is not "presented with a concrete, certain, or immediate legal problem." *Wagner*, 663 A.2d at 567.

Respectfully submitted this 20th day of July, 2020.

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CERTIFICATE OF SERVICE

I, David M. Kallin, hereby certify that on this 20th day of July, 2020, and with the agreement of all parties, I caused the foregoing Reply Brief to be served on all counsel of record via electronic mail.

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